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No. 84-1647

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

**GENERAL MOTORS CORPORATION, LARRY KEEFE, DAVID LUCAS and WILLIAM HARDEN**

*Petitioners,*

*vs.*

**DAVID LEE MITCHELL**

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

This Petition for Writ of Certiorari concerns only two proposed jury instructions.

1.) Respondent objects to Petitioners Statement of the Questions Presented for Review. Petitioners inaccurately use the word "employer" and "employee" when neither word appears in the jury instruction objected to. Rather, the Petitioners asked the jury to find that both an in-house review committee and the offending managers were guilty of intentionally tortious conduct.

The proposed instruction, number 37B, stated:

> In this case plaintiff claims he should recover punitive damages against defendant General Motors, as well as against the individual defendants. Punitive damages, however, may be awarded against General Motors only if you find (1) that Beasley and Sullivan falsely accused plaintiff of falsifying time cards of houly employees and (2) that the Human Resources Management Committee at the plant knew that plaintiff was falsely accused but nevertheless discharged him.

2.) There is no conflict in the Courts of Appeal on corporate liability under 42 U.S.C. § 1981. The cases cited are inapposite. None involved proof of intentional misconduct. Here Respondent proved intentional misconduct by Petitioners. No appellate review has ever been sought on this factual issue.

The proposed instruction, number 44, stated:

> If you find that the Human Resources Management Committee at the South Gate plant had an honest belief, even if mistaken, that plaintiff

signed the time cards of his hourly employees for a full shift but had sent them home early without authorization, and acted on that belief in discharging plaintiff, then you must find for the defendants.

## PARTIES TO THE PROCEEDING

Petitioner's statement of the parties to the proceeding before the Ninth Circuit is incomplete. In addition to plaintiff, DAVID LEE MITCHELL, and defendants GENERAL MOTORS CORPORATION, LARRY KEEFE, (sued erroneously as LARRY KEITH), DAVID LUCAS, and WILLIAM HARDEN, one CHARLES BEASLEY was also a party to that proceeding.

Mr. BEASLEY is not a party to the Petition for Writ of Certiorari. No request for leave to amend the petition has been made. Accordingly, the judgment against him has become final. *Bird v. United States* 241 F.2d 516, 519 (1st Cir. 1957); *D.C. Federation of Civic Associations v. Volpe* 459 F.2d 1231, 1267 (D.C.C.A. 1971).

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1.

## OPINIONS BELOW.

The official citation for the unanimous opinion of the Court of Appeals in this matter is 752 F.2d 385, not 725 F.2d 385 as stated by petitioners.

## 2.

## STATUTES AND REGULATIONS INVOLVED.

Petitioners include 42 U.S.C. § 1981 as a statute involved in this case, however, petitioners fail to cite and include 42 U.S.C. § 1988, a material and important statute cited by the Ninth Circuit Court of Appeals which states, in pertinent part:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions . . . of Title 'CIVIL RIGHTS' [§§ 1977-91] . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

3.

## STATEMENT OF THE CASE.

Respondent adopts the Ninth Circuit's recitation of the facts in this case. (See Petitioners' Brief at pp. A-1-A-6) Petitioners' Statement of the Case is misleading and omits important matters.

First, the nature and extent of MITCHELL's Equal Employment Opportunity Coordinator activities and the nature and extent of his run-ins with BEASLEY, while EEO Coordinator, and later in the factory are down-played. Certain important details of the events on February 25, 1977, the date in question, are omitted, i.e., that the amount of GENERAL MOTORS money over which MITCHELL was fired involved five percent of a partial day's pay for three hourly employees.

Petitioners assert that the present case involved "a single incident of racially offensive behavior." (Petitioners' Brief at p. 19)

This is quite incorrect, as indicated by the Ninth Circuit opinion. It is there shown that over a period of years Mitchell was confronted by supervisor Beasley "whose derogatory racial comments about certain minority employees were reported by Mitchell to Mr. Pig, the Personnel Director." (Petitioners' Brief at p. A-2)

Further, the court of appeals opinion shows that after 1974 there was testimony that respondent Mitchell:

> "....was constantly harassed by Beasley, who monitored his comings and goings, did not pass on telephone messages, and made derogatory racial comments about Mitchell, other minority employ-

ees, and Mitchell's wife." (Petitioners' Brief at p. A-3)

Finally, petitioners inaccurately state the holding of the Ninth Circuit. (See Petitioners' Brief at Pages 8-9) With regard to proposed jury instruction number 44, the Ninth Circuit held:

> "This instruction as submitted was misleading and inaccurate in that it failed to instruct the jury that an employer may be liable for a violation of § 1981 under the doctrine of *respondent superior*."

(See Page A-9 of Petitioners' Brief).

As to petitioners' proposed jury instruction number 37B, the Ninth Circuit held:

> To the extent that this proposed instruction informed the jury that punitive damages could be imposed on General Motors for the ratification or authorization of Beasley's acts, these theories of liability were covered by another instruction, also offered by the defendants, which the judge did give. There is no error in refusing to use any particular language offered by a party, and there is no obligation to give a repetitious instruction. [Citation] . . . "Furthermore, the defendant's proposed instruction is misleading because it omits relevant principles of the law applicable to this case. In addition to liability arising from ratification and authorization, punitive damages also may be imposed, in the absence of proof of fault on the part of the corporation, where the wrongful actor is a managerial employee."

(See Petitioners' Brief at Pages A-12, A-13.)

4.

## SUMMARY OF ARGUMENT.

A. Punitive damages were properly imposed on GENERAL MOTORS, for plaintiff's retaliatory discharge under 42 U.S.C. § 1981, based on the actions of a managerial employee under the doctrine of respondeat superior without ratification of the conduct by an in-house review committee. *EEOC v. Gaddis* 733 F.2d 1373, 1380 (10th Cir. 1984) (en banc); *Miller v. Bank of America* 600 F.2d 211, 213 (9th Cir. 1979); Restatement (Second) of Torts, § 909.

GENERAL MOTORS is responsible where the actions complained of were those of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions. *Miller v. Bank of America* 600 F.2d 211, 213 (9th Cir. 1979). *Flowers v. Crouch-Walker Corporation* 552 F.2d 1277, 1282 (7th Cir. 1977)

B. There is no conflict in the Courts of Appeal on the question of good faith discharge. Each case cited by petitioners is inapposite because the plaintiff failed to prove any intentional discrimination or pretextual discharge by the corporation or any of its employees. In this case, respondent proved intentional discrimination and pretextual discharge by petitioners.

5.

## REASONS FOR REJECTING THE WRIT.

### A. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW ON THE ISSUE OF IMPOSITION OF PUNITIVE DAMAGES, AGAINST A CORPORATE EMPLOYER, UNDER *RESPONDEAT SUPERIOR*, IN AN ACTION FOR RETALIATORY DISCHARGE UNDER 42 U.S.C. § 1981. THE CASES CITED BY PETITIONERS DO NOT SUPPORT THIS CONTENTION AND THE JURY INSTRUCTION OFFERED BY PETITIONERS ON THIS ISSUE WAS ARGUMENTATIVE, MISLEADING, AND AN INCORRECT STATEMENT OF THE LAW.

Petitioners have what amounts to a hidden agendum. It would permit large companies such as GENERAL MOTORS to hide from and avoid responsibility for intentional tortious acts of executives and managerial employees, for whose acts they would ordinarily be responsible, by setting up buffer committees to review this conduct.

Acts of intentional bigotry at companies like GENERAL MOTORS are not done abstractly or in a vacuum by the 'corporation." They are committed by its personnel at its offices and factories supervising others. Here BEASLEY was the acting shift superintendent two levels above foreman MITCHELL when MITCHELL was set up by him and fired.

Petitioners are in reality attempting to obtain appellate review of a factual finding that BEASLEY acted in a managerial capacity and bound GENERAL MOTORS. Petitioners' argument centers upon the alleged impartial nature of the HRM Committee, the high level status of its members, as compared to the much lower level of BEASLEY, and the alleged lack of knowledge by the HRM Committee as to the false accusations made against MITCHELL. Without these assumptions, the argument has no force or effect. (See Pages 22-23 of Petitioners' Brief)

No appellate review has ever been sought regarding sufficiency of the evidence to support the finding that BEASLEY acted in a managerial capacity. The Ninth Circuit specifically raised this issue and indicated it would not undertake a *sua sponte* review of that question. (See Pages A-18, A-19, A-33 and A-34 of Petitioners' Brief) At trial petitioners' counsel never once asserted, intimated, or argued that BEASLEY's actions were other than in a "managerial capacity" and on appeal, Appellants Opening Brief, at Page 35 and Appellants Reply Brief, at Page 10 specifically concede BEASLEY acted in a "managerial capacity." This Court cannot now permit petitioners to raise a factual issue for which appellate review has never been sought and which has been conceded numerous times throughout this litigation.

Finally, petitioners' argument hinges upon its assertion that no knowledge, authorization or ratification of BEASLEY's actions was established against the HRM Committee. (See Petitioners' Brief Pages 4, 6, 7, 22 and 23) Again, because petitioners never sought appellate review re: sufficiency of the evidence to establish knowledge, authorization and/or ratification against the HRM

Committee, they cannot be permitted to do so in this indirect and roundabout fashion.

Petitioners' legal arguments are also misleading. Clearly, the federal common law on damages, in an action under 42 U.S.C. § 1981, must apply. 42 U.S.C. § 1988; *Basista v. Weir* 340 F.2d 74, 85-87 (3rd Cir. 1965).

On the more narrow issue of application of *respondeat superior* in an action under 42 U.S.C. § 1981, numerous federal cases discuss and apply this doctrine

In *EEOC v. Gaddis* 733 F.2d 1373, 1380 (10th Cir. 1984) (en banc) punitive damages under 42 U.S.C. § 1981 were specifically awarded against an employer for actions of a management level employee. That court stated:

> "An employer is liable under both Title VII and section 1981, 'where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy.' [Citations]"

The case of *Miller v. Bank of America* 600 F.2d 211, 213-214 (9th Cir. 1979) cited with approval in *Gaddis, supra,* at p. 1380, specifically applied the doctrine of *respondeat superior* to a corporate employer, for actions of a supervisor who either had authority to hire, fire, discipline and promote *or* had authority to participate in or recommend such actions.

In *Flowers v. Crouch-Walker Corporation* 552 F.2d 1277, 1282 (7th Cir. 1977), plaintiff, a bricklayer, brought an action under Title VII and 42 U.S.C. § 1981 against his corporate employer alleging discharge on account of race. In connection with the doctrine of *respondeat superior*, that court stated:

> "Plaintiff was discharged shortly after having been assigned to a new supervisor, Paul Kolkau, on whom the primary weight of suspicion falls in plaintiff's case. The defendant is liable as principal for any violation of Title VII or section 1981 by Kolkau in his authorized capacity as supervisor. [Citations]"

*Flowers, supra,* at p. 1282.

In the case of *Lucero v. Beth Israel Hospital and Geriatric Center* 479 F.Supp.452, 455-456 (D.Colo. 1979) punitive damages were imposed against a corporate employer, in an action under 42 U.S.C. § 1981, based upon the doctrine of *respondeat superior.* In *Lucero* the plaintiffs were employed as respiratory therapists by defendant, a non-profit corporation operating a hospital. Plaintiffs' immediate supervisor, one Williams, was employed by the corporate hospital as the director of the respiratory therapy department. Above Williams, one Dr. Beckwitt, was the medical director of the respiratory therapy department of the corporate defendant. The *Lucero* plaintiffs claimed a course of continued harassment by Williams and the court so found. In addition, the court concluded the acts of Williams were sufficient to bind the corporation for punitive damages, despite plaintiffs' failure to prove that Dr. Beckwitt or any other high level corporate employee had knowledge of the alleged discrimination claims.

Based upon each of these decisions, respondent believes the federal law on imposition of punitive damages in a retaliatory discharge case under 42 U.S.C. § 1981 is well established and supports the Ninth Circuit's opinion in this regard.

Assuming *arguendo* the federal law on this particular issue is insufficient, the Ninth Circuit was required, by

statute and by case law, to look at and apply California law on this question.

Title 42 U.S.C. § 1988 requires that federal law be used in an action under 42 U.S.C. § 1981. However, that statute goes on to state, in pertinent part:

> " . . . but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . ."

(42 U.S.C. § 1988)

Apparently the Ninth Circuit felt no federal court had:

> " . . . specifically or extensively addressed the standard for the availability of punitive damages where an employer's liability for compensatory damages is predicated on the doctrine of *respondeat superior*:"

and based upon 42 U.S.C. § 1988 and *Basista v. Weir* 340 F.2d 74, 85-87 (3d Cir. 1965) concluded that examination of California law on this issue would be helpful. (See Pages A-15, A-16 of Petitioners' Brief)

The Ninth Circuit's reliance on 42 U.S.C. § 1988 and *Basista* was correct. Petitioners' quotation from *Basista* is misleading, and that case is inapposite here. The issue raised in *Basista* dealt with a small punitive damage award when no compensatory damages were awarded. On that

particular issue, the law in Pennsylvania, the state where the case was heard, differed from the federal law. Accordingly, the *Basista* court held that application of Pennsylvania law would be inappropriate because ample federal authority on that issue existed. *Basista, supra,* p. 87.

Here, the issue re: punitive damages is different from the issue in *Basista* and petitioners' citation of that case as allegedly demonstrating the Ninth Circuit's incorrect application of state law is simply not true.

In this case, the Ninth Circuit correctly interpreted California law on the issue of corporate responsibility for punitive damages. California Civil Code Section 3294(b) specifically states punitive damages may be imposed upon a corporate employer if the particular act, fraud, malice or oppression was done by an officer, director, or managing agent of the corporation.

In *Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 822, cited by the Ninth Circuit, the law on corporate responsibility for punitive damages was stated to be that found in the Restatement (Second) of Torts, § 909:

> "Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if, (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act. (Rest. 2d Torts, § 909)"

In *Grimshaw v. Ford Motor Company* (1981) 119 Cal.App.3d 757, 813, also cited by the Ninth Circuit,

California's application of the Restatement (Second) of Torts, § 909, was reaffirmed.

Petitioners' attempts to distinguish *Egan* and *Grimshaw*, on their specific facts, are unpersuasive and not compelling. Both cases were cited to demonstrate California's adherence to the Restatement of Torts § 909. Under that rule, a variety of factual scenarios are sufficient to impose liability for punitive damages upon GENERAL MOTORS. Because no factual issues have ever been raised in the appellate process by petitioners, their claims of factual distinctions between the instant case and that rule of law must be rejected.

Finally, petitioners' proposed jury instruction 37-B, on this issue, was properly rejected. The instruction itself contained statements of law on the doctrines of ratification and authorization which were covered in another instruction offered by petitioners and given by the District Court. (See Petitioners' Brief at Pages A-31 and A-32) No obligation to give repetitive instructions or to use particular language offered by a party is imposed on the Court. *Temblador v. Hamburg-American Lines* 368 F.2d 365, 367 (9th Circ. 1966).

In addition, the proposed instruction was misleading because it failed to contain any statement of law whatsoever on imposition of punitive damages, in the absence of proof of fault, where the wrongful actor is a managerial employee of the corporation. (See Page A-13 of petitioner's brief).

Thus, the District Court properly instructed the jury on this particular issue. The omitted instruction was legally insufficient and the Ninth Circuit properly affirmed the District Court's refusal to give it.

**B. THERE IS NO CONFLICT IN THE COURTS OF APPEAL ON THE QUESTION OF GOOD FAITH DISCHARGE OF AN EMPLOYEE IN A RETALIATORY DISCHARGE ACTION UNDER 42 U.S.C. SECTION 1981. THE CASES CITED BY PETITIONERS ARE INAPPLICABLE BECAUSE NONE CONTAINED PROOF OF INTENTIONAL DISCRIMINATION OR PRETEXTUAL DISCHARGE BY THE CORPORATION OR ANY OF ITS EMPLOYEES.**

The case below was an action of retaliatory discharge under 42 U.S.C. § 1981. Respondent proved that a managerial employee had intentionally discriminated against him and caused his discharge in retaliation for his civil rights activities. Clearly, intentional and/or deliberate discrimination by the defendant must be proven. *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 802-806, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973).

All of the cases cited by Petitioners are sharply distinguishable from the present case, wherein intentional discrimination was shown. In *all* cases cited by Petitioners there was no evidence whatsoever in the trial court that Plaintiff sustained the burden of proof of intentional discrimination by the corporate employer, through any employees action.

In *Moore v. Sears, Roebuck and Company*, 683 F.2d 1321, 1322-1323, (11th Cir. 1982) the issue was whether the trial judge properly admitted certain memoranda proving that plaintiff had been discharged for reasons other than age, i.e. inability to perform his work. The defendant, Sears, claimed

its reasons for termination were not pretextual and that plaintiff had failed to sustain his burden of proof that there was intentional discrimination against him by anyone at Sears.

Thus, the *Moore* decision stands for the proposition that intentional discrimination must be proven before recovery under 42 U.S.C. § 1981 can be obtained. Respondent agrees with this statement of the law. Here, Mitchell proved the discrimination by Petitioners, against him, was intentional and deliberate. No such proof was available in the *Moore* case and it has no application here.

In *Turner v. Texas Instruments, Incorporated*, 555 F.2d 1251, 1257 (5th Cir. 1977), a black employee claimed he had been discriminated against and terminated for reasons other than the time card violations which were the ostensible cause of his firing. In support of his claim, the employee introduced statistical evidence re: termination of black employees in comparison with the percentage of black employees in the corporation. The court found this statistical evidence did not support a finding of intentional discrimination, because no proof of pretext had been made:

> "With the exception of this evidenee, Turner produced nothing suggesting that TI's reasons for his dismissal and the retention of Burns were pretextural. Turner failed to carry his burden of proof that TI's reasons for dismissal were pretextural."

*Turner, supra*, at p. 1257.

Thus, *Turner* holds that absent proof of intentional and deliberate discrimination by a managerial level employee the corporate defendant cannot have violated 42 U.S.C. § 1981. It does not require that a jury instruction on 'good-faith discharge" be given. The facts in this case amply

demonstrated intentional and deliberate discrimination against Mitchell by Petitioners. The issue of "good faith discharge" and lack of knowledge was negated by the jury's finding of pretext. Accordingly, *Turner* is miscited and inapplicable here.

In *Jones v. Los Angeles Community College District*, 702 F.2d 203, 205-206 (9th Cir. 1983) plaintiff, a female police officer at a college, claimed she had been discharged because of her sex and replaced by a male. The college proved, at various hearings, that Jones was dishonest in the use of sick leave, discourteous in the treatment of fellow employees, inattentive, derelict in her duties and subordinate. Jones failed to prove the pretextual nature of her firing and did not establish intentional discrimination. The *Jones* holding is mis-cited and has nothing whatsoever to do with the facts of this case. *Jones* involved a Title VII claim and a failure to prove pretext and intentional discrimination. Here, Mitchell proved intentional discrimination by a managerial employee, Beasley, and that his firing was pretextual and based on Respondent's previous civil rights activities.

In *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 536, 548 (9th Cir. 1982) the same problem arose. Statistics by black waiters, offered to prove a discrimination charge failed to establish even a prima facie case. The *Gay* court, discussed and upheld the District Court's finding on this issue:

> "Concluding that proof of intentional discrimination is required for section 1981 claims . . . the district court held that the class had failed to prove a prima facie case of an alleged pattern or practice of purposeful discrimination against black male waiter applicants. The district judge

> concluded that the circumstantial evidence was wanting and that the statistical presentation was insufficient to raise a prima facie case . . . and entered judgment for the hotels on the class claim." *Gay, supra*, at pp. 536, 548.

Clearly, in *Gay* there was totally insufficient evidence to prove intentional discrimination. That case differs markedly from the facts here. Respondent does not contend that discrimination can be accidental, negligent or even reckless. It obviously must be deliberate and intentional. Respondent does not claim he was accidentally, negligently, or recklessly set-up, retaliated against and discharged. The actions against him were intentional and deliberate. The District Court properly instructed the jury on this issue, the Ninth Circuit upheld this instruction and Petitioners' claims of error are incorrect.

None of the cases deal with a situation where a manager or other supervisory level employee of a corporation has intentionally discriminated against the discharged employee. Thus, none of the cases cited by petitioners involved a finding that the discrimination and/or firing was "pretextual."

The "good faith belief" and lack of knowledge by some in-house committee who reviewed the discharge is a red herring issue. No case relieves a corporation from liability for acts of the managerial level employee if some in-house body has been established and performs an in-house review of the firing.

To adopt this standard would permit every corporation to avoid all liability under 42 U.S.C. § 1981 by establishing a committee to review all firings. That committee would rubber stamp each discharge, disclaim knowledge of a set-up or retaliation, and, assuming it was properly insulated

from the facts of the case, no discharged plaintiff could ever prove discrimination against a corporate employer. That is not the law and no case cited by Petitioners remotely resembles or deals with that situation. Furthermore, to adopt Petitioners' contentions would eviscerate all 42 U.S.C. § 1981 claims and effectively prevent a discharged employee from ever recovering damages, either compensatory or punitive, against a corporate employer who utilizes this in-house review procedure.

## CONCLUSION

For all the reasons set forth above, respondent urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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